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Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
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Surface Transportation Board
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**Re: *Canexus Chemicals Canada, L.P. v. BNSF Railway Company*, STB
Docket No. NOR 42131**

Dear Ms. Brown:

Accompanying this letter for e-filing in the referenced docket is complainant Canexus Chemicals Canada, L.P.'s Rebuttal Statement.

Please do not hesitate to contact the undersigned if you have any questions.

Regards,

Thomas W. Wilcox
Attorney for Canexus Chemicals Canada, L.P.

cc: Counsel for BNSF Railway
Counsel for Union Pacific Railroad Company
Counsel for CP Railway

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**CANEXUS CHEMICALS
CANADA, L.P.**

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant

Docket No. NOR 42131

REBUTTAL STATEMENT OF CANEXUS CHEMICALS CANADA, L.P.

Pursuant to the decisions issued in this proceeding and in FD-35534, *Canexus Chemicals Canada, L.P. v. BNSF Railway Company* on October 14, 2011 and November 1, 2011, Complainant Canexus Chemicals Canada, L.P. ("Canexus") hereby submits this Rebuttal Statement in response to the Reply Statement of BNSF Railway Company ("BNSF"). In general, BNSF's Reply Statement is replete with unsupported speculation and policy statements about the alleged dire consequences of granting Canexus the relief it seeks in its Complaint, *i.e.* an order requiring BNSF to establish common carrier rates and service terms from Canexus' North Vancouver facility and from Marshall, Washington to BNSF's interchange with Union Pacific Railroad Company ("UP") in Kansas City, Missouri. However, BNSF has offered very little *legal* justification for its

refusal to establish these rates and service terms, which is part of what BNSF describes as a broad proposed “framework” that would entail transporting chlorine in joint line movements “in a way that shared the responsibility to provide the service among railroads needed for the service,” and by which “the rail carrier that serves the U.S. destination would be responsible for handing the long haul.” Reply Statement at 14. In other words, BNSF’s refusal to establish rates to transport Canexus’ chlorine to Kansas City is part of a broader effort by BNSF to abandon the entrenched railroad industry practice of the originating railroad maximizing its long haul and to instead “short haul” itself on chlorine and other TIH movements.

A. BNSF’s Decision to Short Haul Itself is Not Authorized by 49 U.S.C. §10705(a)(2)

The only legal authority BNSF offers in support of its decision to short haul itself on the joint line movements of Canexus’ chlorine to destinations in Illinois, Arkansas, Texas, Louisiana, and Missouri is an assertion that 49 U.S.C. §10705(a)(2) “gives preference in routing to the originating carrier.” Reply Statement at 15. BNSF cites no authority that supports its interpretation of §10705(a)(2) to afford originating carriers a “statutory preference” to unilaterally choose where they will interchange with other railroads. *See* Opening Statement of UP at 5-6 (questioning such an interpretation, which was first raised by BNSF in FD-35524). Moreover, BNSF has taken inconsistent positions on whether it is even an originating carrier for purposes of §10705(a)(2). *See Id.*, (citing to BNSF’s references to being “a bridge carrier and not an originating carrier”). In addition to citing no authority supporting its claim of a “statutory preference” to short haul itself, BNSF makes no attempt to reconcile this claim with the Board’s treatment of the tension between the preferences of joint line movement

participants in *CPL* and *FMC*,¹ which both Canexus and UP have summarized in their prior filings in FD-35524 and in their opening statements in this proceeding.² This discussion includes the recognition that UP, by electing to enter into a rail transportation contract with Canexus for transportation from the Kansas City Interchange, has merely exercised its lawful right to decline to enter into the joint line arrangement preferred by BNSF for this traffic, “and that choice must be accommodated with [BNSF’s] own preferences. *CPL*, 2 S.T.B. at 245; *See* Canexus Reply to BNSF’s Response to the Board’s Order of June 8, 2011 Regarding its Legal Position at 9. *See also FMC* at 4 (“In Bottleneck II, we explained that the bottleneck carrier’s rate discretion is not absolute, and that where a connecting carrier and shipper have entered into a transportation contract to govern service over the non-bottleneck segment of an established through route, the bottleneck carrier can no longer insist on cooperative common carriage through rate arrangements.”). In summary, §10705(a)(2) does not provide a unilateral “statutory preference” to BNSF to short haul itself.

B. BNSF’s Concession that the Kansas City Interchange is Efficient and Feasible Confirms Canexus is Entitled to the Relief it Seeks

In its Reply Statement, BNSF concedes that it “does not contest UP’s claim that the interchange of Canexus’ traffic at Kansas City is feasible and at least reasonably efficient.” Reply Statement at 13. Applying the rules of *CPL* and *FMC* summarized by

¹ The case abbreviations in this Rebuttal Statement coincide with the cases and abbreviations in Canexus’ Opening Statement in this case.

² Canexus Opening Statement at 10-11, citing *CPL*, 2 S.T.B. at 243 (discussing how an origin bottleneck carrier’s routing discretion is no greater than the destination carrier’s routing discretion where, as here, the destination carrier cannot also serve the origin). *See e.g.*, FD-35524, *Canexus Chemicals Canada, L.P. v. BNSF*, Canexus Reply to BNSF’s Response to the Board’s Order of June 8, 2011 Regarding its Legal Position at 9-10.

Canexus and UP in their opening submissions and other filings in FD 35524, this concession confirms that Canexus' request for common carrier rates and service terms to Kansas City was proper, and BNSF's refusal to provide such rates and service terms is a violation of 49 U.S.C. §11101. BNSF's strained attempts to distinguish this case from *CPL* and *FMC* should be rejected. A "'bottleneck segment' is the portion of a rail movement for which no alternative rail route is available." *FMC* at 3, note 8. The record in this proceeding clearly establishes that there was and is no other alternative to BNSF available to Canexus for rail transportation from its North Vancouver facility and Marshall, Washington to Kansas City for interchange with UP for final delivery pursuant to the rail transportation contract between UP and Canexus.³ As such, this is not a situation where a "shipper dislikes the rates or service terms offer by other railroads with the physical ability to provide an alternative service," Reply Statement at 17.

BNSF also weakly attempts to argue that the facts of this case are not similar to those presented to the Board in *FMC*, where the bottleneck rules developed in *CPL* were initially applied. However, this case falls squarely within the circumstances of the *FMC* proceeding, in that there, as here (1) the shipper entered into a rail transportation contract with the railroad that served the destinations of joint line movements; (2) the destination

³ Incredibly, BNSF asserts that Canadian Pacific Railway Company ("CP") is an alternative to BNSF because it "offered to provide service from North Vancouver to Kansas City," Reply Statement at 16. As BNSF well knows, CP Railway intervened in FD-35524 for the sole purpose of informing the Board and the parties that (1) it had not formally established any rates or terms for such service; (2) it would not establish rates and service terms for such service, and (3) CP maintains the STB could not order it to provide such rates and service over CP's objection. See Canexus Opening Statement at 5, which refers the Board to CP's filings in FD-35524, all of which CP asked the Board to treat as CP's opening submission in this proceeding. Opening Evidence and Argument of Canadian Pacific Railway, filed November 3, 2011 at 2. BNSF admits, as it must, that the Canadian National Railway cannot physically provide rail service from North Vancouver or Marshall to Kansas City.

carrier could not also serve the origins; (3) the origin carrier refused to provide common carrier rates to the interchange point to complete the joint line movements using the contract; and (4) there was no dispute that the interchange point from which the contract movements commenced was established between the two railroads and feasible for the movements at issue. Canexus Opening Statement at 12-13.

C. BNSF's Unsupported Speculation of the Dire Ramifications of Granting Relief to Canexus Should be Ignored

BNSF's speculation that ordering it to provide common carrier rates to the Kansas City interchange with UP will set a "dangerous precedent" providing the impetus for all TIH shippers to enter into "back room deals with individual railroads" in order to direct the routing of their traffic should simply be ignored. Reply Statement at 3. In the first place, BNSF cannot be referring to Canexus' contract with UP, since BNSF was fully aware of the contract discussions between Canexus and UP before the contract was executed. See Canexus Reply to BNSF's Response to the Board's Order of June 8, 2011 Regarding its Legal Position at 6, note 7 (citing BNSF's knowledge of the contract negotiations with UP, including that BNSF's Answer in FD-35524 states "BNSF admits it was informed of pending contract negotiations between Canexus and UP").

BNSF has also persistently mischaracterized this case is an example of a *shipper* directing the routing of interline movements, and single-handedly "forc[ing] *its* routing wishes on BNSF by entering into a contract with UP for a portion of the movement." Reply Statement at 3 (emphasis added). To state the obvious, rail transportation contracts are bilateral, which means that the other railroad involved in the movement is also making choices concerning what it considers the overall routing of the movement should be. Yet, BNSF does not accuse UP of forcing *its* routing wishes on BNSF. Indeed,

elsewhere in its Reply Statement BNSF asserts that UP “appears to be in agreement with BNSF on” the issue that “it would be dangerous to allow shippers to dictate how this transportation will be provided.” *Id.* at 19. If UP had reservations about the routing of Canexus’ chlorine through Kansas City – which it clearly does not - it could have declined to enter into a contract with Canexus. BNSF makes no attempt to reconcile this obvious inconsistency between its characterization of Canexus and UP *vis a vis* the rail transportation contract.

In any event, Canexus has never taken the position in this case that it may single-handedly dictate the routing of its traffic.⁴ There is no dispute that the final arbiter of disputes between railroads over joint line routings and interchange locations is this Board. Canexus’ position has always been that under the applicable rules, as applied to its particular facts, BNSF violated its common carrier obligation by refusing to provide common carrier rates and service terms to the Kansas City interchange for transportation in conjunction with the contract between UP and Canexus. These rules establish that the existence of a rail transportation contract from an established, feasible interchange point to final destinations is a key factor in determining the appropriate interchange point, and that an origin railroad desiring to use a different interchange point will not be permitted to unilaterally negate the rail transportation contract by refusing to provide rates to the interchange point selected by the shipper and the connecting railroad. *FMC* at 5.

⁴ Far from dictating the routing of its traffic, Canexus sought BNSF input into the best interchange location on multiple occasions but BNSF elected not to respond to Canexus. Canexus Reply to BNSF’s Response to the Board’s Order of June 8, 2011 Regarding its Legal Position, Verified Statement of Martin W. Cove at 3. This left Canexus with only the input of UP which proposed the use of Kansas City. Canexus then advised BNSF that it was pursuing a contractual agreement with UP over Kansas City which BNSF has since attempted to frustrate.

BNSF's efforts to diminish, if not eliminate altogether, the importance of rail transportation contracting in joint line rail movements should also be rejected. As the Board declared in *FMC*, "there are substantial benefits that derive from a transportation contract that another carrier should not be allowed to negate. A contract provides commercial certainty for both the shipper and carrier – the shipper has rate certainty for the period of time specified in the contract and the carrier has the traffic commitment contained in the contract. Moreover . . . Congress broadly 'encouraged' shippers and carriers to transact rail transportation in this way." *FMC* at 5 (citations omitted); *see also* Canexus Opening Statement at 12-13.

D. BNSF's Decision to Short Haul Itself is Contrary to a Key Underpinning of the BN/Santa Fe Merger

Finally, BNSF's decision to short haul itself on Canexus' chlorine movements that involve UP and all TIH movements generally is contrary to a major public benefit of the merger of BNSF's predecessors Burlington Northern Railroad Company ("BN") and the Atchison Topeka and Santa Fe Railway Company ("Santa Fe"). Specifically, in that proceeding, a key benefit of the merger extolled by the applicants to the Interstate Commerce Commission ("ICC") was that it would result in more efficient single-line service "from points on the BN system and points on the Santa Fe system." ICC Finance Docket No 32549, *Burlington Northern Inc. and Burlington Northern Railroad Company – Control and Merger – Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Co.*, 10 I.C.C. 661, 670 (1995). These points included BN's points in western Canada and Santa Fe's tracks in Kansas City. *See id.*, at 670, note 14. BN and Santa Fe also represented that "[t]ransportation service would be enhanced because they will be able to provide more efficient single-line service over a broader geographic area

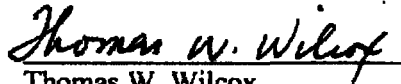
than they currently serve Applicants also contend that expanded single line service should permit them to improve equipment utilization and reduce loss and damage to commodities.” *Id.* at 672. BN and Santa Fe’s representations broadly encompassed all commodities, with no exceptions for chlorine or any other particular commodity. As such, they apparently believed that the merged carrier would be able to handle hazardous shipments efficiently and more safely from origins like North Vancouver and Washington to points like Kansas City by doing so in single line service. In addition, the ICC declared that a “major market enhancement” of the BN/Santa Fe merger would be the establishment of new single-line rail service between Canada and the United States, stating that “[a] commonly controlled BN/Santa Fe will foster the American-Canadian economic integration implicit in NAFTA.” *Id.* at 725. BNSF’s decision to short haul itself on all TIH movements would result in breaking up the longer single line routings created by the BN/Santa Fe merger into joint line movements between BNSF and other railroads, constituting a retreat to a less efficient, pre-merger state, and the potential to increase “loss and damage to commodities” due to moving in joint line service instead of single-line service. The Board should not permit BNSF, which touted the benefits of long-haul, international, single-line service as a key justification for eliminating significant rail competition, to now disavow its obligations as a common carrier by selectively refusing to transport certain commodities it no longer prefers to handle.⁵

⁵ See also, Canexus Reply to Petition of BNSF Railway Company to Vacate the Emergency Service Order and Establish an Expedited Schedule to Address Complainant’s Common Carrier Claims, at 7.

D. Conclusion

The facts developed in the record of this proceeding and FD-35524, as applied to the applicable legal rules and precedent, clearly establish that BNSF has violated its common carrier obligation to provide rates and service terms to Canexus for the transportation of chlorine from Canexus' North Vancouver facility and from Marshall, Washington, to the Kansas City interchange to be transported to UP-served destinations pursuant to the rail transportation contract between Canexus and UP. The Board should issue an order requiring BNSF to immediately establish such rates and applicable service terms.

Respectfully Submitted,



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December 5, 2011

CERTIFICATE OF SERVICE

I do hereby certify on this 5th day of December, 2011 that I have delivered a true and correct copy of the foregoing Rebuttal Statement to the following addressees at the addresses stated via email and regular mail:

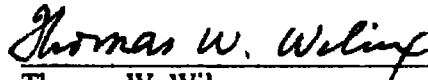
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